

# **In the Supreme Court of the United States**

**OCTOBER TERM, 1946**

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**No. 862**

**THE UNITED STATES, PETITIONER**

**v.**

**JOHN J. FELIN & Co., INC.**

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**ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS**

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## **SUPPLEMENTAL BRIEF FOR THE UNITED STATES**

This supplemental brief is submitted in response to questions from the Bench during the argument. It analyzes (1) the legislative history of the amendments to the Act of October 16, 1941, 55 Stat. 742, contained in the Second War Powers Act, 56 Stat. 181, the provision under which the property here in question was requisitioned, and (2) the legislative history of Section 4 (d) of the Emergency Price Control Act, 56 Stat. 28.

Respondent contended, both in its brief and at oral argument, that the amendment to the act of October 16, 1941, and the enactment of Section 4 (d) of the Emergency Price Control Act, evidenced a Congressional purpose to make ceiling

(1)

prices established under the Emergency Price Control Act inapplicable in determining just compensation for property requisitioned under the act of October 16, 1941.

We think that these contentions are wholly without merit; indeed, it would be surprising if Congress were found to have had the purpose to make available compensation in an amount greater than that required by the Fifth Amendment. Our basic position in this case is that respondent is entitled to just compensation under the Fifth Amendment, as determined in accordance with the standards announced by this Court in a long line of decisions, and that in determining just compensation the existence of a legal market (a real, actual and "ready" market) is a pre-eminent factor.

# I

## LEGISLATIVE HISTORY OF AMENDMENTS TO THE ACT OF OCTOBER 16, 1941 (36 STAT. 742) CONTAINED IN THE SECOND WAR POWERS ACT (56 STAT. 181)

As originally enacted, the Act of October 16, 1941, provided that "Nothing contained in this Act shall be construed \* \* \* (3) to authorize the requisitioning of any machinery or equipment which is in actual use in connection with any operating factory or business and which is necessary to the operation of such factory or business." Also, the original Act of October 16, 1941, provided that "The President shall determine the

amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act \* \* \*, but each such determination shall be made on the basis of the fair market value of the property at the time it is requisitioned \* \* \*."

As the Second War Powers bill was reported to the House of Representatives in February 1942, after the outbreak of the war, Title VI of the bill would have amended the Act of October 16, 1941, by striking from it the prohibition against the requisitioning of machinery or equipment actually in use and which was necessary to the operation of a factory or business. Thereupon, it was pointed out by Representative Hancock and others that if the Act of October 16, 1941, were amended only in this fashion, it would limit the compensation to the fair market value of the machinery or equipment taken, although the loss or damage to the factory or business might be far greater than such an amount. Accordingly, Mr. Hancock introduced an amendment as follows:

Whenever any machinery or equipment which is in actual use in connection with any operating factory or business, and which is necessary to the operation of such factory or business, is requisitioned pursuant to the act of October 16, 1941 (55 Stat. 742), the owner thereof shall be paid fair and just compensation, which shall not be less than the difference between the

fair market value of such factory or business before and after the taking of such equipment or machinery.

Although the Hancock amendment was adopted by the House, there was considerable discussion as to whether the compensation formula contained in that amendment was not too rigid. Representative Gwynne, in particular, urged that the measure of compensation should be determined in each case by the courts under a broad standard of "just compensation." 88 Cong. Rec. 1775-1785.

Thus, as passed by the House, Title VI of the Second War Powers Act eliminated the prohibition in the original Act of October 16, 1941, against requisitioning machinery or equipment of a going factory or business, and provided that in such cases compensation should be measured by the difference between the value of such factory or business before and after the taking of such equipment or machinery.

The Conference Committee took a still different view. In the Conference Report, H. Rep. 1896, 77th Congress, 2d Sess. (1942), p. 6, it is stated that—

This amendment [the Hancock amendment] was made on the floor of the House and proposed that whenever machinery or equipment in actual use, and necessary to the operation of a factory or business is requisitioned, the owner be paid fair and just compensation which shall not be less

than the difference between the fair market value of such factory or business before and after the taking of such equipment or machinery. The conferees agreed to an amendment in lieu of the House amendment which would rewrite the second sentence of the first paragraph of section 1 of the Requisition Law (act of October 16, 1941) to make it clear that the determination as to the amount to be paid for property requisitioned or returned shall be in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States.

Thus it is clear that the amendment of the Act of October 16, 1941, to provide for compensation "in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States," in lieu of the original provision for compensation "on the basis of the fair market value of the property," was intended merely to provide the courts with a more flexible formula for determining compensation in the situations with which Representative Hancock was concerned. There is absolutely no indication that the amendment was intended to preclude the courts from utilizing market price or market value, as they have done in the past, as a general and usual measure of just compensation.

For the Court's information, we are advised by the Civilian Production Administration (successor to the War Production Board) that, ac-



According to their records, the Government has on no occasion taken from a plant or business any machinery or equipment which was found to be in actual use and necessary to the operation of such plant or business. We are further advised that the total requisitions of machinery and equipment from plants and businesses in which they were found not to be in actual use or unnecessary to the operation of such plants or businesses totaled approximately \$3,350,000, computed on the basis of administrative awards at the lower of market or applicable maximum OPA prices.

## II

### LEGISLATIVE HISTORY OF SECTION 4 (d) OF THE EMERGENCY PRICE CONTROL ACT (56 STAT. 28)

Section 4 (d) of the Emergency Price Control Act provides that "Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent."

This provision is obviously a saving clause, having no bearing either on the Government's power to requisition under the Act of October 16, 1941, or on the question of the measure of just compensation for goods requisitioned. The legislative history of Section 4 (d) of the Emergency Price Control Act does not indicate that Congress either intended any special restraint upon the requisitioning power or desired in any way to preclude the courts from considering the effect of the legal market, and the prices prevailing

therein pursuant to the Emergency Price Control Act.

The reports of the House and Senate Banking and Currency Committees on the price control bill (H. Rep. No. 1409, 77th Cong., 1st Sess. (1941), p. 8; S. Rep. No. 931, 77th Cong., 2d Sess. (1942), p. 20) merely state that "Section 4 (d) specifically preserves the right of persons to refuse to sell any commodity or offer any accommodations for rent." Section 4 (d) does not appear to have been discussed in either the House or Senate debates. In a memorandum which was filed with the Senate Committee by the Office of Price Administration (as it existed under Executive order) the following statement is made with respect to the Fifth Amendment (Hearings before the House Banking and Currency Committee, 77th Cong., 1st Sess. (1941) on the price control bill, p. 320):

The fifth amendment of the Constitution provides:

"Nor shall any person \* \* \* be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

Persons urging constitutional objections may complain that the regulation assailed "takes" their property for a public use, and fails to make "just compensation." Such an argument would ignore the fundamental distinction between "a taking" by

the Federal Government and a regulation by the Government. It is only when the Government takes the property away from the owner that the just compensation clause of the fifth amendment is applicable. The proposed legislation contemplates only a regulation, not a taking. No person is required either to turn his property over to the Government, or to sell it to a private person at a specified price. In fact the proposed statute specifically provides that nothing contained therein shall be construed to require any person to sell any commodity. Since the owner may choose not to sell his property at any price, the just compensation clause of the Constitution has no application.

See also Hearings before the Senate Banking and Currency Committee on the price control bill, 77th Cong., 1st Sess. (1941), p. 228, fn. 26. The quoted statement speaks for itself. And other relevant comment makes clear that it was felt that the requisitioning power, like wage control, should be the subject of separate legislation. See particularly the discussion between Representative Kunkel and Mr. Leon Henderson during the House Committee hearings (p. 774, 855); between Representative Kunkel and Mr. Bernard Baruch (pp. 1040-1041); and between Representative Kean and Under Secretary of War Patterson (p. 1541).



## CONCLUSION

It seems abundantly clear that in the adoption of Section 4 (d) of the Emergency Price Control Act, and of the March 1942 amendment to the Requisitioning Act of October 16, 1941, Congress had no intention whatever to preclude the courts from applying the test of market value in determining just compensation for requisitioned goods, or to preclude them from considering the prices prevailing in the only market operating within the framework of Federal law.

Indeed, if the effect of the Emergency Price Control Act is to be disregarded in determining just compensation, and some special formula is to be applied in order to prevent the Act and its operation from being a factor in that determination, it is difficult to see just where the process of attempting to eliminate the effects of governmental intervention in the economic sphere is to cease. If, in the determination of just compensation, the courts are to disregard the Emergency Price Control Act and its effect, must they not then disregard the Tariff Act and its effects; numerous subsidy acts, designed to increase prices of certain commodities; minimum wage legislation, which may incidentally increase the cost of production; legislation affecting transportation rates, and a host of others?

Market price is a resultant of many factors. Pertinent legislation of many kinds enters into that final result. Here a valid act of Congress, designed to create fair and equitable market conditions in time of war, certainly cannot be disregarded. The Act and the prices prevailing in the markets operating within its framework have direct and immediate bearing upon the question of just compensation.

Respectfully submitted.

GEORGE T. WASHINGTON,  
*Acting Solicitor General.*

MAY 1947.

